# EXHIBIT 82

**98 LA 640**

# RAMSEY COUNTY, MINN.

## Arbitration

Case No. 91-PP-188B

November 14, 1991

**In re RAMSEY COUNTY, St. Paul, Minn. and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 320**

### Arbitrator(s)

Arbitrator: John J. Flagler

## Headnotes

### EVIDENCE

**-- Transfer bid -- Deputy sheriff -- Past disciplinary incidents -- 'Just cause' v. 'cause'** ▶ 100.0775▶ 100.08▶ 100.5501

County may present evidence of past disciplinary incidents it relied on to deny 24-year deputy sheriff's transfer bid to patrol division, but evidence must relate solely to grievant's qualifications to perform his duties and cannot be used as support for denial as form of disguised discipline, where county has authority under contract to deny transfer bids only for "cause," and "cause" does not relate to discipline, but means good and sufficient reason for denial. Admissibility standard applicable in arbitration proceedings mandates presentation of all relevant evidence unless precluded by collective-bargaining contract; parties' rights are not contractually restricted in this case; provision on removal of disciplinary matters in personnel file at stated intervals is inapplicable.

### EVIDENCE

**-- Past disciplinary incidents -- Prior award -- Res judicata**▶ 100.0783▶ 100.0775

Evidence of prior disciplinary incidents dating to 1970s may not be considered in 1991 arbitration proceeding arising out of county's denial of deputy sheriff's request for transfer, since these incidents were reviewed in 1983 proceeding in which arbitrator granted earlier request for transfer. Evidence is res judicata.

### Attorneys

Appearances: For the employer: Linda Skallman, personnel services manager; George Katseres, chief deputy. For the union: Jack Mogelson, business representative; Quinn Cook, deputy.

## Opinion Text

### Opinion By:

John J. Flagler

### Decision of Arbitrator

### DISCIPLINARY INCIDENTS

### Background

This case involves the County's denial of a transfer bid by the Grievant to the Patrol Division of the Ramsey County Sheriff's Department. The Sheriff's Department includes four divisions--Court Security, Jail and Detention, Warrants, and Patrol. A deputy sheriff in any and all of these divisions holds the same rank and receives equal compensation. The important advantage for the Grievant of a transfer to Patrol, therefore, has nothing to do with rank or compensation but rather that he greatly prefers Patrol Division work.

The labor contract specifies that seniority shall govern an employee's right to transfer between divisions

except where the County denies such bid for "cause." In regard to the cause standard, the County notified the Union of its intent to introduce at the hearing of this grievance on the merits certain information relating to incidents

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involving the Grievant which date back to the 1970s and 1980s. The Union opposes bringing this information before the Arbitrator on the grounds that not only would it prejudice the Grievant's case but that the collective bargaining agreement expressly requires removal from an employee's personnel file of any material relating to a written reprimand after four (4) years and/or a suspension after six (6) years, if not part of a continuing record.

The parties agreed to bifurcate the issues so that this present proceeding deals solely with the procedural question of whether or not the County should be permitted to present materials adverse to the Grievant which relate to incidents occurring in the 70s and 80s. The parties stipulate that if barred from presenting evidence on these earlier incidents, the County cannot establish the requisite "cause" for denying the Grievant's transfer bid. If the Arbitrator should rule that this evidence be considered the grievance will be subsequently heard on the merits for the purpose of determining whether the evidence supports the County's burden of cause for denying the Grievant's transfer bid.

## The Issue

Should the Arbitrator receive and consider evidence relating to certain incidents for which the Grievant received disciplinary penalties and which the County relies on to deny his transfer bid to the Patrol Division? [1]

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[1] If not, the grievance is moot on the merits and his transfer must be promptly effected.

If such material should be admitted and considered, the grievance shall proceed to hearing on the merits.

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## Applicable Contract Provisions

### ARTICLE IX SENIORITY

9.5 Deputy Sheriffs shall not be transferred from one division of the Sheriff's Department to another division except where necessary for department-wide reorganizations, Deputy Sheriff staff reductions or for cause.

9.6 Deputy Sheriff requests for transfer between divisions will be honored on the basis of Deputy Sheriff seniority as vacancies occur except for cause which will be provided in writing.

### ARTICLE X DISCIPLINE

10.1 The Employer will discipline employees for just cause only. Discipline will be in the form of:

a. Oral reprimand;

b. Written reprimand;

c. Suspension;

d. Reduction;

e. Discharge

10.2 Suspensions, reductions and discharges will be in written form.

10.3 Written reprimands, to become part of an employee's personnel file shall be read and acknowledged by signature of the employee. Employees and the Union will receive a copy of such reprimands and notices of suspension and discharge.

10.4 Written reprimands shall be removed from an employee's personnel file after four (4) years if not part of a continuing record. Suspensions shall be removed after six (6) years if not a part of a continuous record.

## Position of the Union

The Grievant has 24 years of service with the County. He has been an excellent peace office and has the seniority to exercise transfer rights into the Patrol Division. The County seeks to present information which is stale and prejudicial in order to poison the well of his legitimate claim to work he enjoys more than assignments to other divisions.

urther, the contract clearly requires the removal of materials relating to written reprimanded after 4 years and of suspensions after 6. To bring these stale materials forward long after the last disciplinary reprimand which happened in 1989, and a suspension earlier than the 6 year time bar means that the County must be keeping an illegal secret file on the Grievant. If not, then the County simply failed to expunge these materials from his personnel file in derogation of the labor contract. In either event, the use of these kinds of materials in denying the Grievant's transfer request amounts to double jeopardy. A favorable arbitration award in 1983 certainly bars bearing any evidence of events prior to that award.

The Union, therefore, urges the Arbitrator to apply both the clear contract language and well settled principles of arbitral due process by ruling any and all such materials relating to incidents prior to 1987 inadmissible.

## Position of the County

The collective bargaining agreement requires a showing of "just cause" in its provisions regarding disciplinary matters. In keeping with the notion of progressive, corrective discipline, the contract provides the opportunity for an employee to periodically clear the slate so as to not be progressed to inevitable discharge by a cumulative record which he/she cannot ever rehabilitate -- thus the provision for a fresh start after 4 years for a written

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reprimand and after 6 years for a suspension.

This provision relating to discipline and to a just cause standard has absolutely nothing to do with the "cause" standard in regard to denial of a transfer request. Arbitrator Thomas P. Gallagher drew precisely this distinction in AFSCME Council 65, Local 730 and the Eveleth-Fitzgerald Community Hospital, BMS Case No. 89-PP-1276.

The County Sheriff's department provides the citizens of Ramsey County with vital police protection services. ccordingly, no more and no less than the full discretionary authority granted by the labor agreement must be afforded to the County in order that it can meet its mandate for safeguarding public security. This means that the full record of service of any deputy sheriff must be considered in determining the qualifications of an employee seeking to transfer between divisions. In the present case, consideration of the Grievant's full record of past service convinces the County that in no way can the Grievant be given the responsibilities of a deputy sheriff in the Patrol Division.

It is well settled that neither federal nor state rules of evidence apply to arbitration nor do the rigors of trial procedure govern the admissibility or weight to be assigned to evidence offered by the parties. [2] Out of deference to the mandate that arbitration be relatively inexpensive and expeditious, arbitrators routinely admit evidence "for what it's worth" and test the probative value of such evidence in subsequent review of the record as a whole. Some arbitrators, while liberally admitting evidence into the record, may offer guidance as to the possible probative value of challenged evidence so as to save time by avoiding unnecessary rebuttals of patently infirm evidence. [3]

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[2] For fuller discussion of admissibility and probative weighting considerations see Hill & Sinicropi, Evidence in Arbitration, BNA Series on Arbitration, Washington, D.C., 1980.

[3] See Flagler, "Practices at the Hearing," pp. 53-61, Arbitration 1990: New Perspectives on Old Issues, 43rd Annual Meetings of the National Academy of Arbitrators, BNA, Washington, D.C., 1990.

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These liberal admissibility standards apply at the arbitrator's discretion except where a collective bargaining agreement may expressly limit receiving and considering certain forms of evidence. This brings the present issue to the fore and raises the dispositive question of whether Section 9.6 or Section 10.4 should control the procedural decision in this case. Section 9.6 provides, in relevant part, that:

". . .requests for transfer between divisions will be honored on the basis of deputy Sheriff seniority . . . except for cause. . ."

While the County relies on the above-quoted Section 9.6 to argue that the Grievant's long standing employment record contains incidents rising to the level of cause for denying his transfer request, the Union

cites the following Section 10.4 language in support of the Grievant's transfer claim:

"Written reprimands shall be removed from an employee's personnel file after four (4) years if not part of a continuing record. Suspensions shall be removed after six (6) years if not a part of a continuous record."

In the interest of resolving collateral matters, it should be noted that the term "continuing record" as it appears in Article X has no direct relevance in this procedural review. To set this merely peripheral item to rest, a "continuing record" as referred to in Section 10.4 means any recurrence of either a written reprimand before the completion of the 4 year expungement period, and/or 6 years in regard to a suspension before tolling the analogous expungement period.

Turning now to the dispositive consideration, the sole issue remaining turns on whether the collective bargaining agreement draws any distinction between the "just cause" standard of Article X, the Disciplinary section, and Article IX's use of the term "cause" in reference to the County's discretionary authority to deny an employee's transfer bid. I find in this critical regard that the just cause standard in the disciplinary article provides for expungement of the record after 4 years for a written reprimand and 6 years in the case of a suspension in order to give an employee the chance to interrupt and reverse the progressive escalation of penalties which would otherwise move inexorably towards discharge. A common feature of enlightened discipline systems, this provision encourages employees to rehabilitate their conduct and improve their performance.

By way of differentiation, the "cause" standard referred to in Section 9.6 has nothing to do with discipline. The term means nothing more than good and sufficient reason for the County to deny an employee's transfer bid. Conceivably a supervisor might misuse this provision by denying an employee's transfer bid as a disguised form of discipline. Clearly

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such a misuse of Section 9.6 would be a violation of the intent and purpose of the negotiated transfer provision. The most likely "cause" for denying a transfer bid would rest on the assertion that the employee lacked qualifications to do the job satisfactorily. Other legitimate causes might include budgetary considerations, organizational changes and the like.

What this distinction means for purposes of the issue of whether the County may present evidence of past disciplinary incidents is that:

1. In order to be received and considered in the case on the merits, the evidence must relate solely to "cause," i.e., to the matter of whether or not the Grievant is qualified to satisfactorily perform the duties and meet the responsibilities of the Patrol Division assignment.

2. If the evidence carries the coloration of denying the transfer as a means of further penalizing the Grievant, such evidence will be treated as prima facie evidence of abuse of Section 9.6 and of Section 10.1 and the grievance will be summarily sustained.

Obviously, a determination as to whether evidence the County wishes to present relates to the Grievant's qualifications or whether it falls down as a form of disguised discipline cannot be made unless and until the evidence is heard. As to whether this evidence will "poison the well" of the Arbitrator's judgment, I can only assure the Grievant that 38 years in this profession has fairly well immunized me to prejudicial thinking. Beyond that, the prevailing standard of admissibility in arbitration mandates that both parties be given the opportunity to present all relevant evidence and argument unless they have agreed to some contractual restriction on that right. I find no such contractual restriction applicable in this case.

The Union raises two additional collateral questions which warrant comment. Referring to a 1983 arbitration award by Arbitrator Larkin McLellan which reviewed some prior disciplinary incidents involving this same Grievant and found in his favor by granting him transfer to the Patrol Division, the Union asks whether the County should be permitted to introduce evidence dating to the 1970s that McLellan has already put to rest. The short answer is that such evidence must be treated as res judicata and nothing prior to McLellan's award can be relitigated in these present proceedings.

The final question put by the Union asks--if the well of arbitral review continues to be poisoned by past incidents for which the grievant has already been penalized, at what point and under what circumstances can he regain his access to the contractual transfer right? I must observe, with all due respect, that this statement of the issue begs the question by including the loaded assumption that once an arbitrator learns of the facts giving rise to the past disciplinary actions, he/she will necessarily be prejudiced. The correct answer which removes the loaded assumption can be found in the McLellan award. Obviously, McLellan showed no bias --

his opinion well was not poisoned when he reviewed the County's case back in 1983 and concluded that the Grievant's prior disciplinary record did not disqualify him from exercising his transfer rights to the Patrol Division.

Neither party cites any interim arbitration decisions since 1983 involving this Grievant. He is 1-0 and batting 1,000. To suggest that the present Arbitrator would be less objective than Arbitrator McLellan is both speculative and gratuitous. The answer as to when and under what conditions the Grievant can regain his transfer rights to the Patrol Division is elemental -- when this Arbitrator or some other decides that the County has failed to show the Section 9.6 requisite cause to deny him that contractual right.

## DECISION

1. The case will proceed to hearing on the merits wherein the County shall have the right to present evidence of past incidents as they arguably relate to the grievant's qualifications or lack thereof for duty in the Patrol Division.

2. No evidence will be received bearing on the Grievant's disciplinary record prior to the 1983 McLellan award.

3. All such evidence must relate to Section 9.6 "cause" and none can be offered as support for denial of the transfer as a form of discipline.

- End of Case -

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